

## What the reform changes for these cases

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The two decisions applied the old definition of domicile as the seat of business and interests. Under that definition a chief executive who worked in Italy every day had a weak position, unless the court was persuaded, as in 2022, that the family centre outweighed the economic ties. The reform of 2023 moves the analysis towards the facts that favoured the taxpayer in the first case. An entrepreneur whose family lives with him in Ticino now has a domicile there for Italian tax purposes, even if he continues to manage an Italian company. The reform, however, also introduced the criterion of physical presence. The defendant in the second case, had he worked in Italy on most working days of a year from 2024, would be resident under the presence test alone, without any need to discuss his centre of interests.

The practical consequence is a change in the type of evidence that decides cases. Under the old law, disputes turned on the interpretation of documents about economic activity. Under the new law, they will turn on the family's actual life and on days of presence. For entrepreneurs who move to Ticino with their families and organize their Italian business so that they are present in Italy for fewer than half of the days of the year, the position is clearer than before. For those who keep the family in Italy or work in Italy most days, it is weaker, and the burden of proof that the removal of Switzerland from the blacklist lifted from their shoulders will be of little help, because the authorities can prove presence from objective data.

### 1 Administrative and criminal sanctions

A false resident who has filed no Italian tax return faces assessment of the undeclared income with interest and administrative penalties for failure to file. Under Article 1 of Legislative Decree No. 471 of 18 December 1997 the penalty for failure to file was set as a percentage of the tax due, in a range of 120 to 240 per cent. The reform of administrative sanctions by

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Legislative Decree No. 87 of 14 June 2024 has since reduced the ranges for violations committed after 1 September 2024.<sup>1</sup> Foreign assets that were not reported in form RW of the tax return attract separate penalties, together with the wealth taxes on foreign real estate (IVIE) and foreign financial assets (IVAFE). For years up to 2023 the doubled penalties and assessment periods that applied to Swiss assets because of Switzerland's listing remain relevant, a point on which Italian courts have not yet settled whether the milder regime of 2024 applies retroactively.<sup>2</sup>

The criminal risk arises under Article 5 of Legislative Decree No. 74/2000, which punishes the failure to file an income or value added tax return with intent to evade tax where the evaded tax exceeds EUR 50,000 for any single tax. The offence is committed when ninety days have passed after the deadline for the return.<sup>3</sup> Since the amendments of 2019 the penalty is imprisonment from two to five years.<sup>4</sup> An entrepreneur with a substantial income who is reclassified as an Italian resident will almost always exceed the threshold, so that an audit of residence regularly becomes a criminal case. The Court of Cassation applied the same logic to companies in a judgment of 2018, in which it acquitted a defendant only because the threshold could not be proved beyond reasonable doubt.<sup>5</sup> Italian criminal proceedings may also lead to the seizure of assets for the value of the evaded tax, a measure that can reach assets in Switzerland through judicial assistance, discussed in Chapter H.IV.

For the practitioner. - Establish before the move where the family will live, where the children will go to school and how many days the client expects to spend in Italy. - Keep a log of days in Italy supported by objective data, because the authorities can reconstruct presence from tolls, telephones and payments. - Document the move: Swiss lease or purchase, Swiss doctors, schools, insurance and memberships, cancellation of Italian utilities or their reduction to a holiday-home level. - Review Italian income that remains taxable in Italy after the move and file non-resident returns where required. - If the facts do not support Swiss residence, consider Italian returns and voluntary correction before an audit begins.

## 2 Notes

1. Legislative Decree No. 471 of 18 December 1997, Art. 1 para. 1, in the versions before and after Legislative Decree No. 87 of 14 June 2024 (new penalty of 120 per cent of the tax, minimum EUR 250). ↩
2. Molinengo, QuiFinanza, 26 August 2026 (above). ↩
3. Bargagli (above) (threshold of EUR 50,000; offence complete ninety days after the deadline). ↩

4. Bianchi (above) (imprisonment from two to five years); Legislative Decree No. 74 of 10 March 2000, Art. 5 para. 1 and notes, text at Brocardi.it, <https://www.brocardi.it/legge-sui-reati-tributari/titolo-ii/capo-i/art5.html> (penalty raised from one year and six months to four years to two to five years by Art. 39 para. 1 lit. h of Decree-Law No. 124 of 26 October 2019, converted by Law No. 157 of 19 December 2019). ↩
5. Bargagli (above), on Corte di Cassazione, Sezione III penale, sentenza n. 41683 of 26 September 2018. ↩

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